United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

610

No. 22,221

RONALD T. BUTLER, an infant, by BOOKER T. BUTLER, his father and next friend, and BOOKER T. BUTLER, individually, Appellants

v.

DISTRICT OF COLUMBIA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE APPELLANTS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW[1]

In the opinion of the appellants, the issues presented for review are:

1. Whether the pupil-teacher relationship in the public schools of the District of Columbia imposes upon a teacher the duty to control the conduct of pupils in the classroom to prevent them from harming a fellow pupil.

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[1] This case has not previously been before this Court.

2. Whether the District of Columbia, acting through its Board of Education, is under a duty to exercise reasonable care so as to control the conduct of students in a public school to prevent them from harming a fellow student, or from so conducting themselves as to create an unreasonable risk of harm to fellow students.

3. Whether the failure of the school authorities to provide reasonable and adequate supervisory control over pupils in the classroom so as to control the conduct of pupils, constitutes negligence.

4. Whether leaving a classroom unattended or unsupervised when it is known or should have been known that such lack of supervision results in unruly conduct and that injury from such conduct is therefore reasonably foreseeable, constitutes negligence.

5. Whether it was error for the court to preclude the plaintiffs from showing the nature of the inquiry made by the teacher upon arriving in his classroom immediately following an injury sustained by one of his pupils.

6. Whether it was error to preclude the plaintiffs from showing prior unruly conduct by the pupils in the absence of a teacher.

7. Whether the duty of establishing and enforcing rules to control the conduct of pupils involves the performance of a function calling for such a high degree of discretion and judgment so as to constitute the exercise of a governmental function.

8. Whether the judicially-created doctrine of governmental immunity should be judicially abrogated for the District of Columbia.

STATEMENT OF THE CASE

The parties will be referred to as they appeared in the Court below. The infant plaintiff, Ronald T. Butler, by Booker T. Butler, his father and next friend, and Booker T. Butler, individually and in his own right, brought the present law suit against the District of Columbia claiming damages for total loss of vision of the infant plaintiff's left eye. Plaintiffs alleged that on December 13, 1965 the infant plaintiff, then 12 years of age, was a student at the Carter Goodwin Woodson Junior High School, a public school operated by the District of Columbia, and while entering his printing shop class at about 11:22 A.M., he was struck in the left eye by a sharp metallic object thrown by one of the students in the classroom while the students, in the absence of the teacher, were engaged in horseplay. Plaintiffs claim the defendant, District of Columbia, was negligent in failing to provide proper and adequate supervision of the class. At the conclusion of the plaintiffs' case the trial judge directed a verdict for the defendant. Judgment on this verdict was entered on May 15, 1968 and a timely notice of appeal was filed on June 12, 1968.

The evidence introduced in behalf of the plaintiffs in support of their claim was as follows:

The infant plaintiff, Ronald T. Butler, then 12 years of age on December 13, 1965, was a student at the Carter Goodwin Woodson Junior High School, a public school operated by the District of Columbia. The school semester commenced in September, 1965. One of the classes attended by him at this school was a shop class in printing. The instructor of this class was a teacher named Richard Weir. The shop class commenced at 11:20 A.M. (App. 30) and immediately preceding this class was a lunch period. It was mandatory that the students eat their lunch in the cafeteria located in the school building (App. 16) At the conclusion of the lunch period on Decem-

ber 13, 1965, the infant plaintiff and one of his classmates, in accordance with school instructions (App. 16) proceeded from the cafeteria to their lockers, obtained their books, and proceeded to the shop classroom. The infant plaintiff and his companion left the cafeteria just before the bell rang ending the lunch period so that they would not be late for the shop class (App. 17). As the infant plaintiff entered the printing shop classroom at about 11:22 A.M. (App. 17), he observed that the lights had been turned off in the room and that several students were engaged in horseplay, running up and down and sliding along the floor and jumping up from behind the work benches in an effort to scare persons entering the room (App. 18). Just as the infant plaintiff entered the classroom he felt a sharp metallic small object strike and penetrate his left eye, causing him to fall to the floor. He did not see the object but it was pointed and sharp and felt like a piece of metal, and it penetrated the eye (App. 19). The small metallic type was part of the equipment used in the classroom (App. 22). Mr. Weir was not in the classroom when the infant plaintiff entered the shop class (App. 33).

After the infant plaintiff fell to the floor, another teacher, a Mr. Lighter, came into the classroom and inquired about the noise in there (App. 39) and told the plaintiff to get up. The plaintiff complied and stumbled over to a work bench holding his eye (App. 20). About 10 minutes after he was struck in the eye, the classroom instructor, Mr. Weir, came into the room and questioned the students (App. 55), and tried to find out if anybody had been throwing type (App. 55). Counsel for the plaintiffs attempted to find out what Mr. Weir did and said upon entering the classroom but an objection to this testimony was sustained. Counsel for plaintiffs informed the trial court that this testimony was relevant since it was part of the *res gestae* and would explain what the teacher had learned in the course of his inquiry concerning what had happened, and how the plaintiff received his injury (App. 21). One of the witnesses noticed a

few pieces of such type lying on the floor in the area where the plaintiff had fallen (App. 41).

At the beginning of the school semester the shop class was given 14 rules by the instructor which included a rule that the students were not to throw type, and another rule was that the students were to enter the classroom and sit down (App. 27). That Mr. Weir was not present in the classroom or in the hall near the classroom during any part of the time before the infant plaintiff arrived in the classroom (App. 77); there were occasions prior to December 13, 1965 when the students came into the classroom after the lunch period when Mr. Weir was not present; that on no occasions prior to December 13, 1965 did Mr. Weir have hall duty outside of this classroom; that if Mr. Weir would have had hall duty it would have been in front of his classroom (App. 80, 81). One of the witnesses could recall one occasion in the first week in October, 1965 that Mr. Weir went into the back room and the students started playing around and throwing type and that type accumulated on the floor (App. 79); that there were other occasions prior to December 13, 1965 when the teacher was not present in the classroom when the students arrived and counsel for plaintiffs attempted to show how the students behaved on these other prior occasions when the teacher was not present, but an objection was sustained to this testimony on the ground that the witnesses could not fix an approximate date (App. 26). The plaintiff, Booker T. Butler, testified that he was the father of the infant plaintiff and that he received a telephone call from the school nurse advising him concerning Ronald's eye injury and asking him to report to the school immediately. He went directly to the first aid room and then went to the second floor to try to find out what had happened, and he noticed two teachers in the back of the classroom questioning some of the boys, but all he could find out was that the pupils had been playing and throwing type in the classroom (App. 57). On December 14, 1965, the day following this

injury, the plaintiff, Booker T. Butler, and his wife went to the school to talk to the principal, Lawrence E. Graves about the accident, and they were told by Mr. Graves that he had had prior complaints about the pupils playing and throwing type in the classroom when Mr. Weir was not present (App. 74).

Dr. John F. O'Neill testified that he was a surgeon specializing strictly in pediatric ophthalmology; the first time he saw the infant plaintiff was on January 24, 1966; that he had performed several surgical procedures on Ronald's eye and that Ronald would continue to be blind in his left eye (App. 61); in his opinion it would take a moderate amount of force for an object to penetrate into the eye unless it is sharp and has a sufficient velocity, and the amount of velocity would depend on how sharp the penetrating object was (App. 62).

The principal of the school, Lawrence E. Graves, testified that he was responsible for the supervision of the teachers, students, and the entire personnel within the school complex and this included overseeing the safety of the students (App. 67); that it was his policy to assign teachers to duty in the halls so that they would be near the door of their classrooms and might observe their students when they entered (App. 66); even though teachers were assigned to the cafeteria, it was his intention that the teacher would be in the classroom by the time the students moved from the cafeteria to their lockers after being dismissed from the cafeteria (App. 70); it was planned this way so that the teacher would be either in his classroom or by his classroom or on duty outside of his classroom by the time the class arrived (App. 71), and this assignment was made so as to permit the teacher to be in close touch with his classroom (App. 71).

The Associate Superintendent of Schools testified that his office had rules pertaining to the duties of teachers which included a

rule that the teachers must be at their post of duty 15 minutes before the students arrived in the school, but as to the rules concerning the specific assignment of teachers, this was left to the jurisdiction of the principal of the school. That the rules were designed, among other things, for the safety of the students (App. 73).

SUMMARY OF ARGUMENT

I.

Public school personnel in the District of Columbia are under a duty to exercise reasonable supervisory care for the safety of students entrusted to them. The failure to discharge that duty renders the District of Columbia liable in damages for such dereliction of duty under the doctrine of respondeat superior.

II.

It was reasonably foreseeable in the present case from the previous conduct of the students, that injury could result from their behavior in the absence of a teacher in the printing shop classroom. The evidence was therefore sufficient to present a factual issue for the jury as to what, in similar circumstances, reasonably prudent men would have done so as to control the conduct of the students in the classroom and prevent them from harming a fellow student. It was error for the court to direct a verdict on the ground of insufficiency of the evidence.

III.

The distinction between governmental and ministerial functions as defined by the courts, is obscure. In performing the latter, the municipality is liable on essentially the same basis as private persons, whereas in performing the former, the city's immunity resembles

that of the state or sovereign. The efforts of the courts to differentiate between such functions is far from clear and the guidelines are completely inadequate. However, even if such theory is to be followed in the present case, the negligence as alleged and shown with regard to the failure of the defendant's agents and employees to exercise reasonable supervisory care, should be considered a ministerial function.

IV.

This court has acknowledged that the defense of governmental function to a complaint for negligence is an obsolescent and dying doctrine, but has stated that since this is a phase of government immunity, then Congress alone could replace it. Appellants urge, however, that since this doctrine was judicially created, then there is no sound reason why it cannot be judicially abrogated. This court has the authority to reexamine its previous rulings and to reverse itself.

V.

It was error for the trial court to refuse to permit counsel for appellants to develop from the witnesses what the teacher did and said immediately upon his return to the classroom. This line of questioning was admissible as part of the *res gestae* and also was relevant on the issue as to what had occurred. It was also error for the Court to sustain an objection to the line of inquiry concerning the behavior of the pupils and their unruly conduct in the absence of the teacher on occasions prior to the date of the present injury. This line of questioning was relevant in relation to the notice by school authorities of the dangers inherent in permitting the class to remain without supervision.

ARGUMENT

I.

Public school personnel in the District of Columbia have a common law duty to exercise reasonable supervisory care for the safety of students entrusted to them; and the failure to discharge that duty renders the District of Columbia liable in damages for such dereliction of duty under the doctrine of respondeat superior.

It is settled law that school personnel must exercise reasonable vigilance to supervise the pupils entrusted to them so as to protect them from harm. A pupil-teacher relationship imposes upon the teacher the duty to control the conduct of the pupils in his class to prevent them from harming other pupils. This is a common law duty and is not dependent upon any statute or any specific rules or regulations. Restatement, Torts, Section 320 states in effect that one who is required by law to take, or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self protection or to subject him to association with persons likely to harm him, *is under a duty to exercise reasonable care so as to control the conduct of third persons to prevent them from harming the other or so conducting themselves as to create an unreasonable risk of harm to him,* if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third person, and (b) knows or should know of the necessity and opportunity for exercising such control. Comment (a) under this Section states that the rule outlined in Section 320 is applicable to teachers or other persons in charge of a public school. We accordingly state that if the school personnel in the instant case was negligent in the performance of this duty, and if such negligence was a proximate cause of the injury sustained by the infant plaintiff, then the District of Columbia under the common law doctrine of respondeat superior is liable for the consequences of such negligence.

A case directly in point with the case at bar is *Titus v. Lindberg*, 49 N.J. 66, 228 A.2d 65 (1967). This was an action against parents, principal, and Board of Education, for injuries suffered by a school student when struck while waiting for the opening of the classrooms by a paper clip shot from the elastic band by another student who was waiting to board the school bus to be driven to another school. The Supreme Court of New Jersey held that the evidence that the principal had not announced any rules with respect to the congregation of students and their conduct prior to entry into the classrooms, and that he had assigned no teachers or other personnel to assist him in supervising the students, was sufficient to support a finding that he was negligent as to the injured student. The Court further held that since the principal was negligent in taking suitable supervisory precautions, then the defendant, Board of Education, was also liable. The court said:

> "The situation in *Amelchenko* may readily be differentiated from the case against the Board. The Fairview School had been designated as a pickup site by the school system's transportation coordinator and, as a result, many older students customarily congregated on the school grounds in addition to the arriving Fairview students. The dangers and the need for supervision were evident, yet the Board apparently made no supervisory plans and took no precautions. Under the evidence the jury could find that no rules or regulations had been promulgated, no supervisory personnel had been assigned to the area, no guidelines had been given to the coordinator or the principal, and no checkups had been made. *Cf. Selleck v. Board of Education*, supra, 94 N.Y.S.2d at p. 321. On such finding, negligence on the Board's part could readily be determined without invading the holding or underlying policy of *Amelchenko*."

To the same effect is the case of *Cianci v. Board of Education et al.*, 238 N.Y.S.2d 547, 18 A.D.2d 930 (1963). That was an action against the Board of Education and various school officials to recover damages for personal injuries sustained as a result of a school pupil being assaulted by a fellow pupil in a school play area. The trial court dismissed the complaint against the Board of Education upon the jury's verdict in its favor and dismissed the complaint against the various school officials at the end of plaintiff's case. The Appellate Division reversed the judgment and ordered a new trial as to the defendant, Board of Education and the defendant, school principal Elizabeth J. Brown. The court said:

> "We are also of the opinion that it was error to dismiss the complaint as a matter of law against the school principal, Elizabeth J. Brown, at the end of plaintiff's case. Quite apart from any liability imposed by statute, under the common law there was imposed upon her, as the principal, both the duty to be reasonably vigilant in the supervision of the pupils and the liability for her negligent performance of such duty. (Restatement of the Law, Torts, Sec. 320).
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> * * *
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> "If the jury should find that defendant Brown was negligent in the performance of her duty and that her negligence was a proximate cause of the injury, then the Board, under the common law doctrine of respondeat superior, would also be liable for the consequences of her negligence, without regard to the liability which may be imposed upon it by any statute."

The applicable law is also stated in the case of *Morris v. Ortiz and School District No. 1, etc.*, 3 Ariz. App. 399, 415 P.2d 114 (1966). That was an action for injuries to a student of an automechanics class. The trial court directed a verdict for defendants, and

plaintiffs appealed. The Court of Appeals, in holding that the evidence was for the jury on the issue of negligence of the automechanics class teacher with respect to supervision, stated as follows:

> "A pupil-teacher relationship, however, imposes upon the teacher a duty to control the conduct of the pupils in his class to prevent them from harming another pupil. See Restatement (Second) Torts, Sec. 320 and comment (a). The parties are agreed that the applicable standard of care is that of a reasonable, prudent schoolteacher under the circumstances."
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> "It is possible that the trial court, in directing a verdict, concluded as a matter of law that the injuries herein involved were proximately caused by the independent, intervening act of the students rather than by any negligent conduct on the part of the teacher, thereby relieving the defendants of liability. Such a conclusion would be erroneous. If the harmful consequences were brought about by intervening and independent forces, the operation of which might have been reasonably foreseen, there was no break in the chain of causation of such character as to relieve the defendants from liability."

II.

Appellants submit that there was sufficient evidence on which a jury could find negligence in the manner in which this classroom was supervised. In considering the evidence in the aspect most favorable to the plaintiffs, and from all reasonable inferences therefrom, it was shown that the school principal knew of the unruly conduct of the students in this class during the absence of the teacher, and that he had had prior complaints about the pupils playing and throwing type in the classroom in the absence of the teacher

(App. 74). Although the principal testified that it was his policy to assign teachers to duty in the halls so that they would be near the doors of their classrooms, and might observe their students when they entered (App. 66), and that this was planned so that the teacher would be either in his classroom or outside his classroom by the time the students arrived (App. 71), nevertheless, there was testimony showing that Mr. Weir was not in his classroom when the students arrived and that he was not on duty in the hall outside his classroom prior to the present occurrence (App. 77). Furthermore, there was testimony that on no occasions prior to December 13, 1965 did Mr. Weir have hall duty outside of his classroom (App. 81). In view of the fact that the principal of the school had had prior complaints concerning the conduct of the pupils in this classroom in the absence of the teacher, and having failed to assign a teacher to be in the classroom when the pupils arrived, or to delegate him to hall duty immediately outside the classroom, so that he might observe the students, the jury could reasonably conclude that the supervision of this class fell short of compliance with the requirement of reasonable care to prevent students from being harmed by the conduct of their fellow students. It was not necessary that the plaintiff show by positive proof that it was a small piece of metallic type which struck him in the eye, or to show specifically who had thrown this piece of type. It could reasonably be inferred from the testimony that it was a piece of type which had been thrown by a student which struck the infant plaintiff in the eye. Considered altogether, the testimony was sufficient to present a factual issue for the jury as to what, in similar circumstances, reasonably prudent men would have done so as to control the conduct of the students in this classroom, and prevent them from causing harm to the infant plaintiff. It was undisputed that this throwing of type in the absence of the teacher was not a single, isolated or unexpected event. Since this type of behavior was reasonably to be expected in the absence of a

teacher, then the appellants contend the school authorities should have made provision to either have the room properly supervised or to remove these dangerous pellets from the reach of the pupils. It was accordingly error for the trial court to grant a directed verdict on the ground that the evidence was insufficient to show negligence on the part of the school authorities.

III.

Appellants contend that the doctrine of governmental immunity is not applicable in this case since the duty of establishing and enforcing adequate rules to control the conduct of pupils does not involve the performance of functions calling for the highest degree of discretion and judgment. Thus, in the case of *Elgin v. District of Columbia*, 119 U.S. App. D.C. 116, 337 F.2d 152 (1964) it appears that the infant plaintiff was a full-time student at a public school owned and operated by the District of Columbia and was engaged in a required recreational program on the school playground, when he fell into a depressed areaway immediately adjacent to the playground, which areaway surrounded the basement of the school building. The complaint alleged that the fall was the result of the District's negligence in failing to provide or maintain properly an adequate railing or other safeguard around the depressed areaway. The trial court dismissed the complaint, presumably upon the ground that the doctrine of municipal immunity precluded recovery. This court, in reversing the trial court, noted that the function of repairing broken guard rails was merely a ministerial act and did not involve the performance of a function calling for a high degree of discretion and judgment.

Appellants contend that if this court should follow the theory which distinguishes between a governmental function and a ministerial act, then it would be appropriate to conclude that the making

and enforcing of rules to supervise the conduct of pupils does not entail a function calling for a high degree of discretion and that this therefore should also be considered to be a ministerial act. Appellants therefore state it was error for the trial court to grant a directed verdict on the ground that such action by the school authorities constituted a governmental function.

IV.

This court has recognized that the defense of governmental function to a complaint for negligence is an "obsolescent and dying doctrine". *Calomeris v. District of Columbia*, 96 U.S. App. D.C. 364, 226 F.2d 266 (1955). We are, of course, mindful of the fact that this court, in *Calomeris*, and in subsequent cases, took the position that this doctrine was a phase of government immunity, and Congress alone could replace it. However, we respectfully submit that the court, in adopting this position, may have failed to note the judicial source of the inhibition. We believe and urge that a re-examination of this position may induce this Court to perhaps adopt the rationale of the modern decisions which have held that since this doctrine was judicially established, then it may be judicially abrogated.

The doctrine of municipal immunity may be traced back to the case of *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788). The court's rationale in that case which held an incorporated county not liable for damages caused by disrepair of a bridge was that:

> "It is better that an individual sustain an injury than the public should suffer an inconvenience."[2]

Accordingly, the doctrine was adopted in the American Court system even though it was based on the Divine Right of Kings. This,

[2] 2 T.R. at 673, 100 Eng. Rep. at 362.

according to Professor Borchard, "is one of the mysteries of legal evolution."[3]

There is now substantial authority for the proposition that this medieval concept was the product of an abortive translation of the then existing English law into the law of the new republic:

> "It is the prevailing view among students of this period that the requirement of consent was not based on a view that the King was above the law. '[T]he King, as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects.' (Holdsworth, A History of English Law 8, 3rd Ed., 1944). Indeed, it is argued by scholars on what seems adequate evidence that the expression 'The King Can Do No Wrong' originally meant precisely the contrary to what it later came to mean. 'It meant that the King must not, was not allowed, not entitled to do wrong * * *'" (Ehrlich, XII: Proceedings Against The Crown (1216-1377), at 42. See also, *Id.* at 59, 61, 116, 127).[4]

There are probably few tenets of American Jurisprudence which have been so unanimously berated as the governmental immunity doctrine. Many of the modern authorities which have condemned this doctrine have noted that since this was a judicially created doctrine, there was no reason why it could not be judicially abrogated.

In *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957), 60 A.L.R. 2d 1193, the Florida Court, in repudiating the governmental function defense, said at p. 132:

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[3]Borchard, "Government Liability and Tort", 34 Yale L.J. 1, 4 (1924).

[4]Jaffe, "Suits Against Governments and Officers: Sovereign Immunity," 77 Harv. L. Rev. 1, 3-4.

> "Assuming that the immunity role had its inception in the *Men of Devon* case (*Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359 [1788]), and most legal historians agree that it did, it should be noted that this case was decided in 1788, some twelve years after our Declaration of Independence. Be that as it may, our own feeling is that the courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated."

Similarly, in *Colorado Racing Commission v. Brush Racing Association*, 136 Colo. 279; 316 P.2d 582 (1957), the court took a look at the history and evolution of the doctrine of governmental immunity, and repudiated it as a defense.

In the case of *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill.2d 11, 163 N.E.2d 89 (1959), in disposing of the contention that repudiation or overruling of the doctrine should be by legislative, not judicial action, the Illinois court said, at 163 N.E.2d 96:

> "Defendant strongly urges that if said immunity is to be abolished, it should be done by the legislature, not by this court. With this contention, we must disagree. The doctrine of school district immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we can consider that we have not only the power, but the duty to abolish that immunity. We closed our courtroom doors without legislative help and we can likewise open them.
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> "We have repeatedly held that the doctrine of stare decisis is not an inflexible rule requiring this court to blindly follow precedent and adhere to prior decisions, and that when it appears that public policy

> and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule those decisions and establish a rule consistent with our present-day concept of right and justice."

Minnesota and Wisconsin, in 1962, abolished the doctrine of governmental immunity for tort in the respective cases of *Spanel v. Mounds School District No. 621*, 118 N.W.2d 795 (Minn. 1962), and *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962). To the defense contention that reform must be by legislative action, the court in *Holytz*, *supra*, said at 115 N.W.2d 618, 623:

> "The defendant argues that any change in the municipal immunity doctrine should be addressed to the legislature * * * we are satisfied that the governmental immunity doctrine had judicial origins. Upon careful consideration, we are now of the opinion that it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective enactments."

In *Holytz* it was also contended that since the Wisconsin Constitution adopted the common law, the common law could not be changed. To this argument, the court stated, at 115 N.W.2d 618, 624:

> "It is also urged that the immunity rule is a part of the common law which has been adopted by this State and can only be changed by the legislature pursuant to Section 13, Article XIV * * * the doctrine of governmental immunity having been engrafted upon the law of this State by judicial provision, we deem that it may be changed or abrogated by judicial provision."

Again, in the case of *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820 (1960), the court in holding that the municipality could be held liable, said:

> "The borough argues that any such change should come about it, if at all, by the action of the legislature. But the limitation on the normal operation of respondeat superior was originally placed there by the judiciary. Surely it cannot be urged successfully that an outmoded, inequitable and artificial curtailment of a general rule of action created by a judicial branch of the government cannot or should not be removed by its creator."

Appellants state that this Court having closed the courtroom doors without legislative help, then the Court can likewise open them. It is not necessary that courts be slow to exercise a judiciary function simply because they have previously exercised a legislative one.

V.

Appellants claim that the trial court erred on two evidentiary rulings. It has been shown that the classroom instructor, Mr. Weir, came into the classroom about ten minutes after the infant plaintiff was struck in the eye (App.21). At that time, Mr. Weir attempted to find out if anybody had thrown any type (App. 55). Counsel for appellants attempted to find out what the instructor did or said as he entered the classroom (App. 21). Counsel for appellants informed the trial judge that the questioning was relevant since it would explain what the instructor had learned concerning the circumstances surrounding the manner in which the infant plaintiff had been injured. The trial court sustained an objection to this line of questioning on the grounds that it was irrelevant (App. 21, 22).

Appellants state that this evidence was relevant in relation to how the injury occurred. It would also have thrown some light as to the whereabouts of the teacher at a time when he properly should have been in the hall outside the classroom. It has already

been shown that the students were engaged in horseplay for at least ten minutes before Ronald was injured, making a total of at least 20 minutes during which time the class remained unsupervised. Obviously, if the teacher had been in the hall outside the classroom he would have heard the noise when the horseplay commenced and could have stopped the unruly conduct and could have prevented the injury.

The trial court also refused to permit the appellants to develop the issue in relation to notice by the school authorities of the dangers inherent in permitting the class to remain without supervision. Thus, when counsel for appellants questioned the witnesses as to the behavior of the students on prior occasions when the teacher was not present in the classroom, the Court sustained an objection to such questioning unless the witnesses could fix an approximate date (App. 23-26). It had already been established that the school semester had commenced in September, 1965 (App. 14). The injury occurred on December 13, 1965. One of the witnesses had stated that he could recall one occasion in the first week in October, 1965 when the students were throwing type in the absence of the teacher (App. 79). It was shown in evidence that the principal had admitted that he had had prior complaints about the pupils playing and throwing type in the classroom in the absence of the teacher (App. 74). Appellants accordingly urge that it was error for the trial court to sustain an objection to the line of questioning which was very relevant on the issue of notice to the school authorities concerning the dangers inherent in permitting this class to remain without supervision.

CONCLUSION

Appellants urge that it was error for the trial judge to direct a verdict in behalf of the defendant on the grounds of governmental immunity. Even if this theory is followed we state that the failure of the defendant to exercise reasonable supervisory care of its students to prevent injury should be considered a violation of a ministerial function. It was also error for the trial judge to direct a verdict on the grounds that the evidence was insufficient to show negligence.

In view of the above, the appellants urge that the verdict of the trial judge should be reversed with directions to the trial court to grant a new trial.

Respectfully submitted,

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ISSUES PRESENTED FOR REVIEW

1. Whether the District of Columbia school authorities were engaged in the performance of a governmental function in formulating a program for student supervision during the luncheon recess and in allocating available teachers to locations deemed most appropriate.

2. Whether the exercise of judgment by the school authorities in this respect amounted to actionable negligence.

3. Whether the absence of the teacher from the classroom was the proximate cause of the injury sustained by a student which allegedly resulted from the throwing of an object by a fellow student.

4. Whether appellants made proffers of proof and showings of relevancy sufficient to permit them to challenge on appeal the evidentiary rulings of the trial judge.

This case has not previously been before this Court.

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SUBJECT INDEX

CASES CITED

OTHER AUTHORITIES CITED

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* Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

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RONALD T. BUTLER, an infant, by
BOOKER T. BUTLER, his father and next friend
and BOOKER T. BUTLER, individually,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

In a negligence action filed in the court below Ronald T. Bulter, and Booker T. Butler, his father, sought to recover for injuries sustained by Ronald in a classroom of the Woodson Junior High School. The complaint alleged that, while entering the classroom, Ronald was struck in the eye by an object thrown by one of his fellow students, and attributed the resulting injury to the District's alleged failure to provide adequate student supervision.

In its answer, the District denied all allegations of negligence and asserted that it was not in privity with those allegedly causing the injury and that, in any event, it was engaged in the performance of a governmental function. At the trial which followed on May 14 and 15, 1968, there was evidence essentially as follows:

There are 55 teachers on the Woodson faculty and the student body consists of between 1200 and 1300 individuals. Only fourteen of the students were assigned to the seventh grade shop classroom in which Ronald was injured (Tr. 4, 41, 82, 125, 126). The accident which gave rise to the injury occurred on December 13, 1965, after the lunch period, when students were returning from the cafeteria and assembling for their next classes (Tr. 9, 10, 40). Following the termination of the lunch period, at 11:20 a.m., the students were allotted up to five minutes in which to proceed to their classrooms (Tr. 8, 13).

Shortly before the termination of the lunch period, Ronald went to his locker and picked up his books (Tr. 8, 9). In the company of a fellow student, he then proceeded to the shop class. Enroute he observed many students in the hallway. (Tr. 36, 40, 50.)

Some students who had previously entered the shop classroom had been jumping up from behind work benches in an attempt to scare

persons entering the classroom (Tr. 10, 79). As Ronald and his companion neared the classroom door, they were accosted by a classmate who said, "Don't go in the room because the boys in there are going to try to scare you" (Tr. 50).

As Ronald and his companion entered the classroom, at about 11:22 a.m., Ronald was talking to his companion and "joking around" (Tr. 9, 153). The room lights had been turned off by a student at an unspecified time (Tr. 50, 80), and two students who were hiding behind work benches jumped up, extending their hands in an attempt to scare Ronald and his companion. At this point, Ronald turned his head and was struck in the eye by an unknown object (Tr. 9, 50). He fell in the direction of one of the students who had been hiding and who had a pencil protruding from his pocket (Tr. 70-72, 75). Ronald had taken no more than three steps into the classroom at the time of his fall (Tr. 10).

Neither Ronald nor any of his fellow students knew the cause of the fall and eye injury (Tr. 13, 42, 70, 81, 83, 153). Two students testifying in Ronald's behalf denied throwing type (Tr. 82, 157, 158), and one of these students stated that he at no time observed any type throwing in the classroom (Tr. 82). The other student testified that there was type on the floor in the vicinity of the fall (Tr. 154).

When Ronald fell to the floor, the lights were turned on, and Ronald's companion then observed that there were four students in the classroom, exclusive of Ronald and himself (Tr. 50-52). A few moments later, a woodwork teacher entered the classroom and told one of the students to bring him a paddle. As the student was returning with the paddle, the shop teacher arrived in the classroom. (Tr. 14, 15, 50, 52, 69, 153.)

According to one of Ronald's fellow students, on a prior occasion in the first week of October, he and others had thrown type when the teacher was out of the classroom (Tr. 155, 158).

The physician who examined and treated Ronald testified that, although Ronald sustained an eye injury, the "object that struck his eye was not known" (Tr. 94, 96, 98). When asked to "express * * * the type of force it took to cause this injury," the physician asserted that "[i]t is difficult to say * * * just how much velocity" was required as this would depend on how sharp the striking object was (Tr. 112).

The Assistant Superintendent in charge of junior and senior high schools in the District of Columbia testified that the Board of Education has a rule whereby teachers must arrive at the school fifteen minutes before the students are scheduled to arrive, but, once the teachers have arrived, it was within the discretion of the principal as to where they

should be assigned at a given time. In this connection, he noted that, although assigned to a classroom, teachers must nonetheless perform additional duties "about a school building when the students are there" (Tr. 132, 133). When questioned with reference to Board of Education directives as to supervision of junior high school pupils, he stated that the Board "has assigned the responsibility for the supervision of pupils to a principal" and that this responsibility was "interpreted in a broad way, because the principal has the ultimate responsibility for the direct assignment of the teacher" (Tr. 134).

In view of the 1200 to 1300 students in attendance at the Woodson Junior High School, the principal employs a system of "floating teachers." During lunch periods the faculty members, including the shop teacher, are required to perform cafeteria duty, playground duty, or duty in the hallways where there are large concentrations of students. As a result, teachers cannot always be present in their classrooms when their students return from the luncheon recess. In recognition of this problem, detailed written instructions had been issued to students, spelling out what they were to do until the arrival of the teacher. (Tr. 21, 30-34, 40, 118-120, 125-129.) Appellants introduced no evidence concerning the shop teacher's duty assignment during this particular luncheon recess or his whereabouts at the time of the injury (Tr. 14, 41, 57, 58, 128, 129).

Ronald's father testified that, on the day following the injury, he and his wife went to the Woodson Junior High School and were told by the principal that "he had had complaints about the pupils playing and throwing type in the classroom when the teacher * * * was not present" (Tr. 141). Mr. Butler did not further elaborate on this conversation, and the principal, in the course of his testimony, denied having received any complaints respecting the behavior of the students in the shop class on any occasion prior to the accident (Tr. 121, 122; cf. 143).

At the conclusion of the plaintiff's case, the District moved for a directed verdict (Tr. 169). After hearing arguments of counsel, the court directed a verdict in the District's favor (Tr. 192). The court noted that "in essence" the complaint was that the school authorities were negligent in failing to have a teacher present, not only for the purpose of instruction, but, in addition, "when members of the class are assembling for the next session" (Tr. 188). Commenting on the evidence adduced by the plaintiff in support of this allegation, the court stated:

> "The evidence discloses that there were no instructions from the Board of Education or Superintendent's office requiring any such practice and that there were no instructions by the Principal to the teacher to follow such a practice, and further that principals of junior high schools such as Woodson are vested with dis-

cretion in such matters. The evidence further shows that teachers had hallway or cafeteria duty during changes from class to class and at the luncheon period; that hallway duty position of the printing shop class teacher was in the area of the classroom or middle of the hallway or at the cafeteria, and that there was a failure by the Plaintiffs to show that the teacher was not at one of those positions. The evidence further discloses that while the authorities would like to have a teacher in each classroom not only at the time of the class period but also at the time of the assembling of the members thereof but that that action was not practical and that the teachers were stationed where the greatest need existed. In regard to the approximately fourteen students in the classroom here under consideration, the need for supervision was minimal as compared to the areas where at different times there were concentrations up to at least 800 students which required the teachers of the various classrooms to supervise the students coming and going. The Associate Superintendent of the School System testified for the Plaintiffs that the Principal of Woodson was vested with discretion in the matter of handling and endeavoring to protect students. The evidence shows that in the instant case such assignment was in fact made by the Principal of Woodson. There was no direct evidence that horseplay did not or did occur when teachers were present, but the court for this motion will assume that there would not have been or there would have been certainly less such action when the teacher was present." (Tr. 188, 189.)

The court then concluded that "the complaint on which the action is based related to a clearly discretionary matter for resolution by the

school authorities" and that such "a discretionary matter" falls within the governmental immunity doctrine as that doctrine was discussed by this Court in Elgin v. District of Columbia, 119 U. S. App. D. C. 116, 337 F. 2d 152 (1964). Accordingly, the court ruled that the District could not be called upon to respond in damages (Tr. 189-191).

The court additionally held that there had been no proof of negligence, stating:

> "* * * [A]part from the court's determination that the school authorities were engaged in a government fuction and therefore not liable to respond in damages even if there be negligence, the court holds that there is no evidence before the jury on which it could reasonably determine that the allocation of the available teachers was a negligent act." (Tr. 191.)

This appeal followed.

SUMMARY OF ARGUMENT

In formulating a program to insure the safety of students during the luncheon recess and in allocating available teachers to those locations believed most conducive to effective student supervision, the school authorities were engaged in a discretionary activity protected by the doctrine of governmental immunity. For this reason, liability cannot be predicated on the failure to provide for supervision of the particular classroom in which the injury occurred.

Moreover, it is axiomatic that an exercise of judgment by a municipal official at the planning level cannot constitute actionable negligence. This kind of policy judgment was unquestionably made here when the school authorities determined that student safety during the luncheon recess could be most effectively promoted by allocating the available teachers to locations other than the classroom.

In any event, the law is clear that the absence of a teacher from a classroom cannot be considered the proximate cause of a sudden, spontaneous, and unexpected act whereby one student injures another. This is certainly true where, as here, there is no probative evidence of notice to the school authorities of prior similar student misconduct indicative of continuing danger.

The trial judge did not abuse his discretion in excluding evidence which counsel for appellants attempted to introduce when, in disregard of the Federal Rules of Civil Procedure, counsel failed to make a specific offer of proof reciting the facts sought to be established. The failure of counsel to comply with such a procedural requirement and to demonstrate the relevancy of the proposed evidence is fatal to any meaningful claim on appeal of prejudice.

ARGUMENT

I

The court below correctly held the District's liability foreclosed by the doctrine of governmental immunity.

In concluding that the District of Columbia was engaged in the performance of a governmental function at the time of the act complained of, the court below noted that the essence of the complaint was that the school authorities were negligent in failing to have a teacher present, not only for the purpose of instruction, but, in addition, when students were assembling for their next class session (Tr. 188). The court ruled that the action of the school authorities in this regard was purely discretionary and thus gave rise to no basis for imposing liability under the doctrine of governmental immunity as that doctrine has been interpreted and applied by this Court. The undisputed evidence of record cogently supports the court's ruling.

"Where there is room for policy judgment and decision there is discretion." Dalehite v. United States, 346 U. S. 15, 36 (1953). And see Sayre v. United States, 282 F. Supp. 175, 191 (N. D. Ohio, E. D., 1967). The record discloses that the Board of Education has a policy whereby the protection and supervision of students is entrusted to the discretion of a school's principal (Tr. 134); that, consistent with this

policy, the principal of the Woodson Junior High School was responsible for the safety and well being of between 1200 and 1300 students; and that only fourteen of such students were assigned to the classroom in question (Tr. 41, 82, 125). In an attempt to achieve maximum order and safety for the large number of students assembling for post-luncheon sessions, teachers were stationed where the greatest need for supervision existed. Thus, various members of the Woodson faculty were assigned to cafeteria duty as well as to duty in the halls where there were heavy concentrations of passing pupils (Tr. 125-129). For this reason, it would have been an impractical, indeed an impossible, exercise of administrative discretion to have a teacher stationed in each classroom at the time of the day which marked the occurrence of the injury (Tr. 125). The element of discretion takes on even greater significance when considered in connection with the particular classroom involved, where the need for supervision was rendered comparatively minimal by the presence of only a small number of pupils. And it was in plain anticipation of the teacher's inability to be present in his classroom at such times that the principal, in a further exercise of discretion, provided for the issuance of detailed instructions to students, spelling out how they were to remain occupied until the teacher arrived (Tr. 118-120).

The cumulative effect of this undisputed evidence is that, in complaining of the failure of the school authorities to station a teacher in the classroom involved between the luncheon recess and the following session, appellant's are challenging an exercise of top-level administrative discretion in its most classic and obvious form. In Elgin v. District of Columbia, 119 U. S. App. D. C. 116, 337 F. 2d 152 (1964), this Court held that, while the District may sometimes be held liable for injuries sustained by a pupil as a result of the failure to perform a ministerial function, there is no basis for imposing liability where, as here, the injury flows from failure to perform a discretionary act.

And in Urow v. District of Columbia, 114 U. S. App. D. C. 350, 316 F. 2d 351 (1963), discussed at considerable length in Elgin, it was sought to impose liability on the District for its alleged negligent failure to provide a traffic control device at an intersection. In concluding that the doctrine of governmental immunity prevented the imposition of liability, the Court said (114 U. S. App. D. C. at 351, 316 F. 2d at 352):

> " * * * Pursuant to the legislative authority the Commissioners have designated certain intersections for the installation of traffic control signals and have provided the hours during the day and night such signals shall operate. The establishment of such a general traffic control plan is essentially legislative in character and

> is the result of the Commissioners' exercise of discretion and judgment. To argue that failure to exercise a discretionary authority is negligence serves only to underscore the legislative character of the authority. Whatever defects there may be in the doctrine of municipal immunity from tort liability, the doctrine is sound in this context. * * * "
> [Footnote omitted.]

The analogy between Urow and the instant case is compelling, for in each instance there is a challenge to a general safety plan. In each instance the essence of the challenge is that, in formulating the plan, consideration should have been given to taking more extensive precautionary measures to insure safety at the particular location of the injury. But there is no substantial distinction in principle between the failure to provide a traffic signal at an intersection to control the movement of vehicles, and the failure to provide a teacher in a classroom between the lunch period and the following session to control the activities of assembling students. Each factual situation depicts a manifest exercise of administrative discretion which cannot result in municipal liability. In short, if the doctrine of governmental immunity is to have any validity at all, it is here.

Apparently recognizing the weakness of their contention that the case presents a ministerial function, a position to which they devote but two paragraphs in their brief (pp. 14-15), appellants proceed to argue

that the doctrine of governmental immunity is an obsolete and dying doctrine and should now be abolished by this Court (brief, pp. 15-19). It is clear, however, that appellants are asking this Court to undertake what it has, on numerous occasions, refused to undertake. In an unbroken line of decisions, this Court has held that abolition of the doctrine of governmental immunity is a matter which rests within the legislative judgment of Congress rather than within the province of the judiciary. See Elgin v. District of Columbia, supra, and cases cited therein at footnote 2, 119 U. S. App. D. C. at 117, 337 F. 2d at 153.

II

The court below correctly ruled that no evidence of negligence had been adduced.

In directing a verdict in the District's favor, the court below also concluded that there was no evidence on which the jury could have based a finding of negligence. Urging to the contrary, appellants claim that their evidence presented a factual question as to whether the school authorities were negligent in failing to provide supervision of the classroom during the post-luncheon assembly. They then advance the hypothesis that Ronald was injured by a piece of type thrown by a fellow student. At the outset it should be noted that, while the evidence disclosed

that there was type on the floor in the vicinity of Ronald's fall, fellow students called as witnesses could offer no explanation whatever as to the cause of the injury (Tr. 13, 42, 70, 80, 82, 83, 153, 158). The medical evidence adduced was equally inconclusive (Tr. 112).

It is settled in this connection that negligence is a fact to be proved and will not be inferred from the mere happening of an accident. Collins v. District of Columbia, 60 App. D. C. 100, 48 F. 2d 1012 (1931); United States Rubber Company v. Bauer, 319 F. 2d 463 (8th Cir., 1963). But even if the record permits the inference that the injury was caused by the throwing of a piece of type in the classroom, by no stretch of the imagination can such conduct be attributed to any negligence of the school authorities.

A school is not an insurer of the safety of its students. Reasonable care does not require constant supervision of all movements of all pupils at all times, and a school cannot be held liable for every thoughtless or careless act by which one pupil may injury another while on the school grounds. A judicial reluctance to attribute negligence to school authorities under circumstances similar to those here present is plain from the applicable decisional law. See Townsend v. Benavente, 339 F. 2d 421 (9th Cir., 1964); Carroll v. Fitzsimmons, 153 Colo. 1, 384 P. 2d 81 (1963); Lawes v. Board of Education of City of New York,

16 N. Y. 2d 302, 266 N. Y. S. 2d 364, 213 N. E. 2d 667 (1965); Woodsmall v. Mt. Diablo School District, 10 Cal. Rptr. 477, 188 Cal. App. 2d 262 (1961); and see cases cited in Argument III, infra.

Essential to ascertaining the dimensions of the duty of supervision owed here is a consideration of the case in its proper context. The injury in question did not occur in the course of an actual class session in the presence of an inattentive teacher. Nor did the injury flow from a situation which contains within it the "seeds of unruliness" such as, for example, unsupervised athletic activity in a gymnasium. Cf. Cirillo v. City of Milwaukee, 34 Wis. 2d 705, 150 N. W. 2d 460 (1967). Instead, this case involves an injury occurring in a classroom during the luncheon recess while the students were assembling for their next classes. In an attempt to insure maximum safety of the pupils at this particular time of the school day, the school authorities structured and adhered to an elaborate student supervision program, the specifics of which have been set forth in Argument I, supra. Their actions in this respect were wholly consistent with due care. They owed no duty to require by such a program that teachers remain in continuous contact with their classrooms during the post-luncheon assembly, when, in the exercise of administrative judgment, the overall problem of student safety could be best resolved by placing them elsewhere. This proposition is illustrated by a comparison of the case principally relied on by appellants with another case cited and distinguished therein.

In Titus v. Lindberg, 49 N. J. 66, 228 A. 2d 65 (1967) (appellant's brief at 10), a student was struck by a paper clip shot on the grounds of the Fairview School. The particular school grounds had been designated by the school system's transportation co-ordinator as a pick-up site for other schools, including the school attended by the assailant. This individual had previously attended Fairview and its records depicted him as "very rough" and a "bully." He had in fact discharged a paper clip from an elastic band, striking another student in the back five minutes before the injury complained of. On appeal it was concluded that the negligence of the school authorities was correctly submitted to the jury. But the basis for the court's decision was that the principal of Fairview and the Board of Education had made no rules with respect to the congregation of students in the pick-up area, had assigned no teachers to supervise the students, in short, had taken no precautionary measures to insure student safety (228 A. 2d at 70, 72). In reaching this result, the court considered clearly distinguishable the case of Amelchenko v. Freehold Borough, 42 N. J. 541, 201 A. 2d 726 (1964), which involved a fall in an uncleared municipal parking lot after a heavy snowfall. In that case, the municipality was held free from negligence as a matter of law because, in planning its snow removal program, in establishing priorities, and in allocating its

limited manpower and equipment to different locations, it was engaging in an "exercise of judgment" which did not rise to the level of actionable negligence.

The principle to be deduced from a comparison of the two cases is that, while a municipality may be negligent when it fails to undertake any supervisory or safety precautions in a school building, there can be no basis for a finding of negligence where, as here, it structures an elaborate safety program, fixes priorities, and then allocates its available personnel to places where, in its judgment, maximum safety will be achieved. For this reason, Titus is not "directly in point" as claimed by appellants (brief at . 10), and the court below correctly concluded that there was "no evidence before the jury on which it could reasonably determine that the allocation of available teachers was a negligent act" (Tr. 191).

III

In any event, the conduct of the school authorities was not the proximate cause of the injury.

There is no evidence of record on which the jury could have based a finding that the absence of the teacher from the classroom was the proximate cause of the injury. On the contrary, considered in a

light most favorable to appellants, the evidence discloses that the injury was caused by a sudden and spontaneous intervening act of a third party which could not have been anticipated and safeguarded against by the school authorities in the exercise of reasonable care. A consideration of similar cases will graphically illustrate this point.

In Guyten v. Rhodes, 65 Ohio App. 163, 29 N. E. 2d 444 (1940), a pupil in a class for defective and incorrigible youths was struck in the eye by a milk bottle thrown by another student while the teacher was gossiping in another room. Concluding that the teacher's absence could not be considered the proximate cause of the injury, the Court said (29 N. E. 2d at 445, 446):

> "* * * [T]he violent disposition of the pupil assaulting the plaintiff appears to be the direct and proximate cause of plaintiff's injury and the absence of the * * * [teacher] only a remote cause, if any, requiring the employment of conjecture to sustain any connection between the absence and the injury."

And in Ohman v. Board of Education, 300 N. Y. 306, 90 N. E. 2d 474 (1949), a pupil was struck in the eye by a pencil thrown by a fellow student while the teacher was temporarily absent from the classroom for the purpose of sorting and storing in a closet schoolroom supplies. The lower court directed a dismissal of the complaint, ruling that there was no liability as a matter of law. Affirming the judgment

of the lower court and concluding that the teacher's absence was not the proximate cause of the injury, the New York Court of Appeals said (90 N. E. 2d at 475):

> " * * * [I]t does not follow that such absence was the proximate producing cause of the injury, which was due, as we see it, to the tossed pencil. Whether it was done mischievously and heedlessly or wantonly and willfully, or with the serious purpose of returning the pencil to its owner, it was the act of an intervening third party which under the circumstances could hardly have been anticipated in the reasonable exercise of the teacher's legal duty toward the plaintiff. * * * Here even if we assume without conceding that the teacher was negligent in leaving the room for any purpose, for any length of time, it does not follow that the board is liable for the consequences of an unforeseen act of a third party. This would constitute the board an insurer, and we would no longer have need to consider the applicability of long-established and well-recognized rules of common-law negligence. * * * "

Morris v. Ortiz and School District No. 1, etc., 3 Ariz. App. 399, 415 P. 2d 114 (1966), relied on by appellants (brief, pp. 11, 12) is of no help to them, since the decision in that case was reversed by the Supreme Court of Arizona, En Banc, ____ Ariz. ____, 437 P. 2d 652 (1968). In reversing, the court articulated principles which lend considerable support to the position of the District of Columbia. Factually, that case involved an injury occurring in an auto mechanics class while several students were attempting to bend the top of an auto-

mobile which the teacher wanted dismantled. After several unsuccessful attempts to bend the top, the teacher came over and said, " 'It's too bad, but it can't be bent. Take it out and dump it out in the area in the back.' " Instead of doing this, the students undertook further bending efforts, in the course of which a student (Gillmor) jumped off the back bumper onto the top, thereby causing injury to another student (Morris). In absolving the school authorities from liability as a matter of law, the court concluded that the jumping was a "wholly unexpected" act and that the teacher engaged in no negligence which proximately caused the injury. Reversing the decision of the intermediate appellate court and upholding the direction of a verdict in favor of the school authorities, the Court said (437 P. 2d at 654):

> " * * * [T]o constitute actionable negligence the defendant must owe a duty to the plaintiff, the breach of which results proximately in plaintiff's injury. [Citation omitted.] So, the question which must be answered is, 'What duty did Ortiz owe as the supervising instructor, the breach of which resulted in Morris' injury?' To hold that Ortiz had to anticipate Gillmor's act and somehow circumvent it is to say that it is the responsibility of a school teacher to anticipate the myriad of unexpected acts which occur daily in and about schools and school premises, the penalty for failure of which would be financial responsibility in negligence. We do not think that either the teacher or the district should be subject to such harrassment nor is there any invocable legal doctrine or principle which can lead to such an absurd result." [Emphasis added.]

These principles are equally applicable in the case at bar. Here, too, the evidence presents, at best, an injury caused by an unpreventable sudden and unexpected act which cannot be causally connected with the teacher's absence from the classroom. Or, as the Court so aptly put it in Nash v. Rapides Parish School Board, 188 So. 2d 508, 510 (La. App., 1966), a case which, like this one, involved an injury inflicted by a fellow student on school grounds at a time when the class was not in session:

> "* * * How could any teacher anticipate a situation where one child, while teasing another child, would be struck in the eye with a stick by a third child? Even if such action could have been anticipated, there is no showing of any likelihood whatsoever that such action could have been prevented by a teacher or supervisor even if said teacher or supervisor was standing right there. As is often the case, accidents such as this, involving school children at play, happen so quickly that unless there was direct supervision of every child (which we recognize as being impossible), the accident can be said to be almost impossible to prevent."

It is claimed by appellants, however, that there was evidence that the school authorities had knowledge of previous type throwing in the classroom and that this evidence was sufficient to require submission of the case to the jury on the issue of whether foreseeability of future injury required the taking of added safety precautions (brief,

12, 13). . The asserted evidence relied on is the testimony of the injured student's father that, on the day after the injury, he was told by the principal of Woodson Junior High School that:

> "* * * he had had complaints about the pupils playing and throwing type in the classroom when the teacher, Mr. Weir was not present." (Tr. 141.)

Mr. Butler did not elaborate any further in this regard, and appellants offered no additional evidence tending to establish prior student misconduct in the classroom. Moreover, the principal denied having received complaints of any such misconduct (Tr. 121, 122).

There is more than one reason why this testimony lacks sufficient probative value to give rise to a jury question. In the first place, it constitutes self-serving, double hearsay (i.e., Mr. Butler said he heard the principal say what the principal, in turn, allegedly heard another person say). Uncorroborated hearsay of a self-serving nature, certainly when it is hearsay upon hearsay, constitutes, at best, a scintilla of evidence which is insufficient to create a question of fact. See Murphy v. New York & Cuba Mail S. S. Co., 50 App. D. C. 341, 345, 273 Fed. 305, 309 (1921); W. W. Conner Co. v. McCollister & Camp-

bell, Inc., 9 Wash. 2d 407, 115 P. 2d 370 (1941).[1] This is especially so where, as here, this kind of uncorroborated hearsay is contradicted by competent evidence. Cf. American Rubber Products Corp. v. N. L. R. B., 214 F. 2d 47, 52 (7th Cir., 1954).

In addition, the testimony relied on is conclusory in nature and does not reflect the number of complaints or their proximity or remoteness to the occasion here involved, manifestly significant factors in determining its probative value.

In Lawes v. Board of Education of City of New York, supra, in which a child was injured by a snowball thrown by a fellow student on school grounds, it was held that proof of a previous snowball throwing complaint was insufficient to create a question of fact as to negligence, the Court stating that (213 N. E. 2d at 668):

> "* * * Proof that a snowball was thrown on the previous day is very thin and, even if fully credited, would not give fair notice of the kind of continued danger which should have been prevented by the active intervention of teachers." [Emphasis added.]

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[1] Indeed, in a very recent case, the court, in commenting on the probative value of hearsay evidence in general, stated that even when this kind of evidence "is admitted without objection, this court will not consider such testimony when weighing the sufficiency of the evidence to go to the jury." Miller v. Baum, 400 F. 2d 176, 178 (5th Cir., 1968).

Similar considerations are applicable here, for the record falls woefully short of depicting that the school authorities had notice of any threat of "continued danger" sufficient to require the taking of added safety precautions in the classroom. Cf. Rivera v. Columbus Cadet Corps of America, 59 N. J. Super. 445, 158 A. 2d 62 (1960).

IV

The proceedings below were totally free from prejudicial error.

Appellants challenge the action of the court below in sustaining two objections to testimony which they sought to introduce. The court sustained the first such objection when counsel for appellants asked a student what the shop teacher said or did when he entered the classroom several minutes after the injury occurred (Tr. 16, 17). When questioned by the court as to the relevance of the teacher's conduct in this respect, counsel replied in conclusory fashion that "it explains the circumstances surrounding what happened because in his [the teacher's] inquiry he learned what had happened and how the boy got hit" (Tr. 17). But at no time did counsel make to the court a proffer setting forth what specific facts he sought to develop by this particular testimony. In this connection, Rule 43(c) of the Federal Rules of Civil Procedure plainly requires that:

> "In an action tried to a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. * * * " [Emphasis added.]

Having failed to make a "specific" offer of proof, appellants should not be permitted to successfully urge reversal on the mere possibility that the exclusion of the testimony in question was harmful error. See Stafford v. American Security & Trust Co., 60 App. D. C. 380, 55 F. 2d 542 (1931); Moss v. Hornig, 314 F. 2d 89, 93 (2nd Cir., 1963); and see Andrews v. Olin Mathieson Chemical Corporation, 334 F. 2d 422, 425 (8th Cir., 1964), which holds that a broadly worded proffer such as that here tendered by counsel is insufficient to satisfy the requirements of Rule 43 (c).

In any event, evidence respecting what knowledge the teacher acquired after the accident had little, if anything, to do with the question of the alleged antecedent negligence of the school authorities in failing to provide adequate student supervision. On no theory then was there an abuse of judicial discretion in sustaining the objection of Government counsel. See Post, et al. v. United States, ____ U. S. App. D. C. ____, ____ F. 2d ____ (Nos. 20,861-63, decided October 15, 1968).

The second evidentiary ruling challenged by appellants is controlled by the same legal principles. In this respect, appellants urge that the court erroneously precluded counsel from questioning a witness as to student behavior in the classroom on prior occasions when the teacher was absent. Here again, counsel made no specific proffer of proof as to the type of behavior sought to be established and significantly failed to approximate any time or date of occurrence (Tr. 24-26). The failure of counsel to approximate the dates of the asserted previous activities becomes especially significant when it is considered that it was essential for the trial judge to ascertain their proximity or remoteness to the injury in question before he could effectively determine their relevancy and admissibility. "The district court exercises a wide discretion in ruling upon questions of remoteness of evidence." Miller v. Alexandria Truck Lines, Inc., 273 F. 2d 897 (5th Cir., 1960); 31A C. J. S., Evidence, § 159. Having failed to provide the court with a factual foundation for an exercise of discretion, appellants cannot justly complain on appeal of an abuse of discretion.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the court below is in all respects correct and in accordance with law and should, accordingly, be affirmed.

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December 11, 1968

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,221

RONALD T. BUTLER, an infant, by BOOKER T. BUTLER, his father and next friend, and BOOKER T. BUTLER, individually, Appellants

v.

DISTRICT OF COLUMBIA, Appellee

PETITION FOR REHEARING
and
SUGGESTION FOR REHEARING EN BANC

Come now the appellants, Ronald T. Butler, an infant, and Booker T. Butler, in the above case by their counsel and petition this Court to permit a rehearing, and suggest a rehearing en banc of its judgment entered on June 20, 1969 affirming the judgment appealed from by appellants. In support of this petition, the following is respectfully submitted:

The majority opinion of this Court apparently neglected to notice or overlooked the testimony of the witnesses which established a jury question.

We contend that this evidence clearly established without contradiction that the plan of supervision designed by the principal of the school was not being followed on the day in question. If we take this evidence most favorably to plaintiffs, it appears therefrom that plaintiffs at least presented a jury question as to whether the classroom teacher was in fact following the established plan of supervision.

The principal of the school testified that under his plan of supervision, the teacher in question was assigned to duty as a hall or cafeteria supervisor. The principal testified that he could not recall specifically on the day in question whether the teacher, Mr. Weir, was on duty in the cafeteria or hallways. Thus, on page 69 of the Appendix, we find the following:

> "Q. Did you make a determination as to the duties to be assigned the different teachers in your school?
>
> "A. I did, yes.
>
> "Q. Could you tell us what determination you made with Mr. Weir?
>
> "A. To be very honest with you, I cannot recall specifically whether Mr. Weir was on duty in the cafeteria or hallways. I cannot say specifically. Primarily we had the three people who were in charge of the cafeteria and we did assign teachers, additional teachers to this. He may have been one of them."

The principal of the school further testified that even though the teachers were assigned to the cafeteria it was the intention under his plan that by the time the students moved from the cafeteria to their lockers, that the teacher should be present in the classroom. Thus, at page 70 of the Appendix, the following on cross examination of the school principal appears:

> "Q. Did you feel it was proper or improper to assign teachers to the halls and the cafeteria and make that duty and thereby make them a few minutes late for their classrooms?

"A. It was not with the intention of making them a few minutes late to their classrooms, *even though the teachers were assigned to the cafeteria by the time the students would move from the cafeteria to their lockers,* after they had been dismissed and prepared to come to their classrooms, *it was our intention that the teacher should be there.*" (Emphasis added.)

And on redirect examination of the principal the following appears at page 71 of Appendix:

"Q. You told Mr. Feretti that it was your *intention* you said that the teacher *should be in the classroom by the time the students left their lunch and picked up their books* at the lockers and went to the next class. What did you mean by your intention?

"A. This is the way we had planned it, so that the teacher *would be either in his class or by his class or on duty outside the hall outside of his class by the time the class arrived.* There may be occasions when he was a minute or so late.

"Q. What *was the purpose in having the teacher be on duty near his classroom?*

"A. *No. 1, this is the place where he was assigned his duty post outside of the class as the lines are passing.*

* * *

"Q. The fact you assigned the teacher outside his own classroom would this have any bearing on the fact that this would permit him to be in close touch with his classroom?

"A. Yes, whenever this was possible, this was done.

"Q. Did the same situation pertain to Mr. Weir and his class?

"A. I would hope so. I do not remember the particular details of what took place on that day and where Mr. Weir was." (Emphasis added.)

The majority opinion on page 4 states that:

> "Plaintiffs offered no evidence that Mr. Weir was not performing his assigned duty on the day in question but, to carry their burden of showing negligence on this point, rely on the fact that the teacher was not present in the classroom. * * *"

The above conclusion by the majority opinion is completely in error. All the evidence offered by the plaintiffs clearly showed that Mr. Weir was not performing his assigned duty on the day in question. *The fact that he was not present in his classroom was merely the result of his failure to perform his assigned duties.* The testimony is thus clear that the lunch period was over and that the infant plaintiff proceeded to his locker to obtain his books and then proceeded to his classroom. Under the plan designed by the principal of the school, the classroom teacher was thereupon required to proceed from his cafeteria duty to his classroom so that the classroom teacher, Mr. Weir, would be in the classroom by the time the students moved from the cafeteria to their lockers. This plan was designed so that the teacher would be *either in his classroom or on duty outside his classroom by the time the class arrived.* (See Appendix, page 70 and 71.)

It is thus obvious that Mr. Weir had not followed the plan of supervision on the day in question. It is therefore erroneous for the majority of this Court to state that the plaintiffs offered no evidence that Mr. Weir was not performing his assigned duty on the day in question. It is clear from the evidence that Mr. Weir *failed to return either to his classroom at the conclusion of the lunch period or failed to assume hall duty outside or by his classroom following the lunch period,* so that he would be at either place "by the time the class arrived."

In establishing that the classroom teacher was not in the hallway at or near his classroom, the witness, James Albert Rice, testified as follows at page 77 of Appendix:

"Q. Were there any other pupils in the classroom with you before Ronald arrived there?

"A. Yes, sir.

"Q. Was Mr. Weir, the teacher present in there during any part of the time before Ronald arrived?

"A. No, sir.

"Q. Was Mr. Weir in the hall near the classroom before Ronald arrived?

"A. No, sir."

See also page 81 of Appendix, where the same witness testified as follows:

"Q. Do you know where Mr. Weir would have his hall duty when he had hall duty?

"A. It would be right in front of his room."

The very plan designed by the principal of the school was not being followed on the day in question at the time the infant plaintiff sustained his injury. Surely, the burden of showing why the plan was not being followed would fall upon the principal or other officials of the school.

It is respectfully submitted that the petition should be granted in view of the failure of the majority opinion to notice the critical evidence in this case and the erroneous conclusion by the majority opinion that the plaintiffs offered no evidence that Mr. Weir was not performing his assigned duty on the day in question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc has been mailed, postage prepaid, this 17th day of July, 1969, to David P. Sutton, Esquire, Assistant Corporation Counsel for the District of Columbia, attorney for appellee, District Building, Washington, D. C. 20004.

I. Irwin Bolotin
Attorney for Appellants

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,221

RONALD T. BUTLER, an infant, by BOOKER T. BUTLER,
his father and next friend, and
BOOKER T. BUTLER, individually,

Appellants

v.

DISTRICT OF COLUMBIA,

Appellee

SUGGESTION OF APPROPRIATENESS OF HEARING EN BANC

Come now the appellants, by their counsel, and respectfully suggest to the Court the appropriateness of a hearing en banc in the above entitled case. In support thereof, the following is respectfully submitted:

1. On December 13, 1965, the infant plaintiff, then 12 years of age, while a student in a public school operated by the District of Columbia, was entering his printing shop class when he was struck in the left eye by a sharp metallic object thrown by one of

the students in the classroom. It was shown that the students, at the time, in the absence of the teacher, were engaged in horseplay. This resulted in a permanent and total loss of the vision of the left eye. The injury is attributed to the failure of the District to discharge its common law duty to exercise reasonable supervisory care for the safety of students entrusted to them.

At the conclusion of plaintiffs' case, the trial judge directed a verdict for the defendant on the grounds that there was no evidence before the jury on which it could reasonably determine that the allocation of the available teachers was a negligent act, and also that the doctrine of governmental immunity prevented the imposition of liability against the District. The briefs of both parties, on file with this Court, contain a full and detailed statement of the case and argument.

2. In filing the instant Suggestion of the Appropriateness of a Hearing En Banc, the appellants are attempting to follow the procedure outlined by Circuit Judge McGowan in the case of *Elgin v. District of Columbia*, 119 U.S. App. D.C. 116, 337 F.2d 152 (1964) wherein Circuit Judge McGowan in writing for the court noted (footnote No. 2) that this Court recently held to its earlier position, namely, that termination of municipal tort immunity is, insofar as the District of Columbia is concerned, a question to be resolved at the legislative level by the Congress of the United States; and that whatever the merits or demerits of this position, a re-examination of it is a matter for the full court and not merely a division. Circuit Judge McGowan further noted that the appellants in *Elgin, supra*, did not, as they could have done, move for such a hearing. Appellants herein are accordingly filing the instant Suggestion of the Appropriateness of a Hearing En Banc with the thought that this Court may decide that the time is now appropriate for a re-examination of its position and join the ever growing number of

jurisdictions which have, upon re-examination of their previous positions, decided to abolish sovereign immunity by judicial fiat.

While the appellants feel that the decision of the trial court is erroneous and requires a reversal of the same, they are also asking this court to abrogate the doctrine of governmental immunity as it applies to the District of Columbia so that this doctrine in the instant case will not constitute a bar to recovery against the District.

3. One of the basic arguments advanced by the state courts in reversing their prior positions and in abrogating the immunity doctrine, was the rationale that since this was a rule of law which was imposed and continued by court decision, then it should be abolished by court decision. This rationale was noted by Circuit Judge Wright in his dissenting opinion in the case of *Urow v. District of Columbia,* 114 U.S. App. D.C. 350, 316 F.2d 351 (1963) wherein he stated:

> "The doctrine of sovereign immunity, as it relates to responsibility for torts, in the District of Columbia, as elsewhere, is a creature of the courts. It would seem, therefore, that the courts here, as they have elsewhere, may undertake to relieve the District of this albatross."

The appellants herein have cited several recent cases in their brief, at pp. 15 through 19, from various jurisdictions wherein the courts, by judicial fiat, have abolished the doctrine of sovereign immunity for tort, despite the argument advanced in opposition to such action, that any change in the doctrine should be addressed to the legislature. Circuit Judge Wright, in his dissenting opinion in the *Urow* case, *supra,* has also cited (footnote No. 3) several of the jurisdictions which have held that it was appropriate for the courts themselves to abolish this immunity and to establish a rule consistent with the present day concept of right and justice.

4. Three jurisdictions, in addition to those previously called to the attention of this court in appellants' brief (and those cited by Circuit Judge Wright in his dissenting opinion in *Urow, supra*) have recently joined the modern trend of judicial abrogation of governmental immunity from tort. These are Indiana, Arkansas and Kentucky. See *Brinkman v. City of Indianapolis* (1967, Ind. App.), 231 N.E.2d 169; *Klepinger v. Board of Commissioners of the County of Miami* (Ind.), 239 N.E.2d 160, decided on July 26, 1968; *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45, rehearing denied July 15, 1968; and also *Haney v. City of Lexington* (1965, Court of Appeals of Kentucky), 386 S.W.2d 738.

5. It was further noted by Circuit Judge Wright in *Urow*, that:

> "The doctrine of sovereign immunity has been the subject of a crescendo of criticism."

This court has criticized this doctrine on previous occasions by referring to it as "an obsolescent and dying doctrine."

As was also so aptly stated in the *Haney* case, *supra*, wherein the State of Kentucky by judicial fiat abrogated the doctrine of governmental immunity of municipal corporations, and did so retrospectively:

> "So, once again, we are called upon to examine this legal anachronism of municipal immunity from liability for tort. In 41 N.C.L.Rev. 290, 291 (1963), this is said:
>
> " 'There is probably no tenet in our law that has been more universally berated by courts and legal writers than the governmental immunity doctrine. The criticisms are wide-ranging and highly varied. Some common examples are: that it is unfair to impose upon the individual the burden of his damage, rather than upon the entire community where it

justly belongs; that by denying a remedy for a wrong, the doctrine results in the deprivation of life, liberty, and property without due process of law; and that the doctrine runs counter to a basic concept underlying the law of torts, that is, that liability follows negligence.'

"We pointed out in V. T. C. Lines, Inc. v. Harlan, Ky., 313 S.W.2d 573, that this Court in late years has accepted the theory with reluctance and has seized upon almost any excuse, however flimsy, to grant relief to any person harmed by negligence of a municipal corporation. The acceptance or use of a theory does not prove the truth or validity of the rule of law it supports. If its worth has been proven by extended experience, we can be content with that theory. But when a theory supporting a rule of law is not grounded upon sound logic, is not just, and has been discredited by actual experience, it should be discarded, and with it, the rule it supports. As stated in Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457, 460, " 'The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia.' "

6. The courts of this jurisdiction have, for many years, suggested that the attention of Congress might well be directed to the matter of municipal tort immunity. It may be argued, however, that the Congress is far too busy with national and international affairs and other major problems to itself devote any time to scanning through local court decisions to ascertain which rules of law established by the courts should be abolished or repealed by legislation. There accordingly exists in the District of Columbia a situation which is not conducive to bringing this matter to the attention of the Congress for action. District citizens have no representation in Congress and have no voice in the election of those

responsible for legislative action for the District. The occasional citizen in the District who is confronted with the problem of "governmental immunity" cannot be expected to direct a matter of such importance to the attention of Congress. This problem affects the entire community.

It will be noted that the very persons who should "direct" this matter to the attention of Congress, with an appropriate recommendation, are the District officials and in particular, the office of the Corporation Counsel, which are the very interests which enjoy the protection of immunity from tort liability. Quite naturally those interests are not anxious to have this rule of law abolished. Appellants are unaware of any effort by the office of the Corporation Counsel to "direct" this matter to the Congress for appropriate action. It may be expected that those interests will oppose this suggestion for a hearing en banc as well as any attempts to have this doctrine abolished, either by legislation or by judicial fiat.

7. While the Congress may undoubtedly abolish the doctrine of municipal immunity by legislation, there is no reason why this court may not also abrogate a court-made rule of law. Appellants have been unable to find any statutory enactment or congressional power which would prevent this court from abrogating this judicially created doctrine. Congress has adopted a general policy in the area of tort claims on a Federal level (Federal Tort Claims Act). Having established such a policy, on a Federal level, it may be assumed that Congress deferred to the wisdom of the court the question of continuing or abolishing the doctrine on a local level. Moreover, it may be argued that the Congress might expect the court to correct its own mistakes. *Klepinger v. Board of Commissioners, etc., supra.* See also the concurring opinion of Justice Currie in *Holytz v. City of Milwaukee,* 17 Wis. 2d 26, 115 N.W.2d 618.

Congress has by legislation indicated in which areas there shall be *no* governmental immunity. It may be assumed that Congress is leaving to the court the question whether it should adhere to its own rule of immunity in other areas. In the case of *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 218, 11 Cal. R. 89, 93, 359 P.2d 457, 461 (S. Ct. 1961), the court stated:

> "We are not here faced with a situation in which the legislature has adopted and established judicial interpretation by repeated re-enactment of a statute. Nor are we faced with a comprehensive legislative enactment designed to cover a field. What is before us is a series of sporadic statutes, each operating on a separate area of governmental immunity where its evil was felt most. Defendant would have us say that because the legislature has removed governmental immunity in these areas we are powerless to remove it in others. We read the statutes as meaning only what they say: That in the areas indicated there shall be no governmental immunity. *They leave to the court whether it should adhere to its own rule of immunity in other areas.*" (Emphasis added.)

8. The trial court in the instant case (and Appellee), have taken the position that since the principal of the school was vested with discretion by the School Board in the manner employed by him in protecting students, that this is a discretionary matter for resolution by the school authorities, and that such a discretion falls within the governmental immunity doctrine. Appellee argues in its brief, at p. 8-9, that the manner employed by the school authorities in protecting students is an exercise of discretion by a municipal official at the planning level, and cannot constitute actionable negligence. Appellants state that the answer to this argument is that the exercise of "discretion" by the school principal in allocating his teachers, and in devolving a general safety plan to protect the

students, is not the exercise of such a "governmental function" calling for the highest degrees of discretion and judgment, so as to prevent the imposition of tort liability. Appellants contend that the *allocation* of teachers and other *details* necessary to be accomplished for the protection of students entrusted to the school authorities is but a "ministerial" function. The courts of several jurisdictions, including this court, have attempted to lessen the severity of the rule of governmental immunity by distinguishing between functions of the municipal corporation which were purportedly "governmental", and those thought to be "proprietary". At most, the distinctions seem to be contrived and without logical basis. As was noted in the *Haney* case, *supra:*

> "We will not trace the history of the attempt of the courts to lessen the severity of the rule of municipal immunity. It is sufficient to say that courts made distinctions between functions of the municipal corporation that purportedly were governmental or public and those thought to be proprietary or private, denying liability in the case of governmental functions, but imposing it in situations involving proprietary actions. At most, the distinctions seem to be contrived and without sensible basis. That which was proprietary in some states was deemed governmental in others. See Annot. 60 A.L.R.2d 1198, 1204 (1958).
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> * * *
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> "We believe that all of these contrived devices resulted from the fact that the courts for many years have been repelled by the injustice of the rule of municipal immunity and have attempted to soften its harsh application by seeking a few escape hatches."

9. The infant plaintiff has lost the complete sight of his left eye *through no fault of his own.* If the decision of the trial court remains unchanged, it will mean that the infant plaintiff is without

any recourse for his injury. Such an unjust situation should not be permitted to exist by adherence to a dying and obsolescent doctrine. This court should no longer avoid the responsibility of changing a court-made rule of law which, in the interest of justice, should be changed, or attempting to shift to Congress the burden of repealing a rule of law which the court has imposed upon the District.

It is accordingly respectfully submitted that this Court should accept the instant Suggestion of Appropriateness of a Hearing En Banc and grant such a hearing in this case.

Respectfully submitted,

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